MOTION FILED
APR 13 1987

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE MEMORANDUM IN SUPPORT OF MOTION AND ANSWER

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April 13, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Plaintiff

v.

STATE OF WYOMING,

Defendant

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE

Basin Electric Power Cooperative ("Basin"),[1] as Project Manager and Operating Agent for the Missouri Basin Power Project ("MBPP"), by its attorneys, moves for leave to intervene in this action under Rule 9.2 of this Court's Rules and to file an answer in the form attached to this motion.

Basin seeks to intervene to (1) protect its existing rights to store water from the Laramie River by means of Grayrocks Dam and Reservoir (a feature of the MBPP) for use in the operation of another feature of the MBPP, a thermal electrical generating plant known as the Laramie River Station, (2) assure that it can honor its existing contractual obligation to store

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[1] List of affiliates required by Rule 28.1 is appended to this Motion.

water in Grayrocks Reservoir for release to downstream users, and (3) assure that it can honor its commitments with respect to storage of water in and release from Grayrocks Reservoir under an Agreement of Settlement and Compromise. Basin's intervention is appropriate because:

(a) it has a compelling interest in the storage and diversion of the waters of the Laramie River, a principal tributary of the North Platte, by means of Grayrocks Dam and Reservoir;

(b) the applicability of the Decree of this Court entered in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), to Basin's rights to the waters of the Laramie for the purposes described above is one of the principal issues in this proceeding;

(c) Basin is so situated that this Court's disposition of this action may as a practical matter impair or impede Basin's ability to protect its interests in the operation of Grayrocks Dam and Reservoir; and

(d) neither Nebraska, Wyoming, nor the United States will adequately protect Basin's interests in the proper resolution of this action.

Respectfully submitted this 13th day of April, 1987.

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APPENDIX

LIST OF AFFILIATES REQUIRED BY RULE 28.1

(Basin has no parent company and all subsidiaries are wholly owned *)

COLORADO

Highline Electric Association
P.O. Box 57
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Hugo, CO 80821-0008

Morgan County Rural Electric Cooperative
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Fort Morgan, CO 80701-0738

Mountain Parks Electric, Inc.
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81 West Agate - Hwy 40
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Mountain View Electric Association, Inc.
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1655 5th Street
Limon, CO 80828-0346

Poudre Valley Rural Electric
Association, Inc.
P.O. Box 1727
4809 S College
Fort Collins, CO 80522-1727

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* Of the other Participants in the Missouri Basin Power Project, listed in n. 1, p. 3 of Basin's Memorandum in Support of Motion for Leave to Intervene, only Tri-State Generation and Transmission Association, Thornton, Colorado, is a corporation.

Tri-State G&T Association, Inc.
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Union Rural Electric Association, Inc.
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Y-W Electric Association, Inc.
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Harrison County Rural
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Woodbine, IA 51579-0002

Ida County Rural Electric Cooperative
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Lyon Rural Electric Cooperative
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Plymouth Electric Cooperative
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415 Eighth Street SE
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South Crawford Rural Electric Cooperative
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Denison, IA 51442-0428

Western Iowa Municipal Electric
Cooperative Association
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Manning, IA 51455-1030

Woodbury County Rural Electric
Cooperative Association
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Moville, IA 51039-0509

MINNESOTA

Lyon-Lincoln Electric Cooperative, Inc.
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Minnesota Valley Cooperative Light
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Montevideo, MN 56265-0717

Renville-Sibley Cooperative Power Association
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Traverse Electric Cooperative, Inc.
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Alliance, NE 69301-0677

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Burke-Divide Electric Cooperative, Inc.
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Capital Electric Cooperative, Inc.
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Central Power Electric Cooperative, Inc.
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James Valley Electric Cooperative, Inc.
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Kem Electric Cooperative, Inc.
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Mor-Gran-Sou Electric Cooperative, Inc.
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North Central Electric Cooperative, Inc.
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Oliver-Mercer Electric Cooperative, Inc.
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R.S.R. Electric Cooperative, Inc.
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Newell, SD 57760-0137

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Selby, SD 57472-0135

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Mission, SD 57555-0169

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Bison, SD 57620

H-D Electric Cooperative, Inc.
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Clear Lake, SD 57226-0307

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DeSmet, SD 57231-0126

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Blunt, SD 57522-0216

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Miller, SD 57362-0227

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Gregory, SD 57533-0439

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Tri-County Electric Association, Inc.
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West Central Electric Cooperative, Inc.
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Rural Electric Company
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220 Main Street
Pine Bluffs, WY 82082-0518

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Shoshone River Power, Inc.
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Cody, WY 82414-0640

Tri-County Electric Association, Inc.
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221 Main Street
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Wheatland Rural Electric Association
P.O. Box 120
2154 South Rd.
Wheatland, WY 82201-0120

Wyrulec Company
P.O. Box 359
221 Main Street
Lingle, WY 82223-0359

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No. 108, Original

STATE OF NEBRASKA,

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MEMORANDUM IN SUPPORT OF MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE

STATEMENT OF THE CASE

This action, accepted by the Court's Order of January 20 (55 LW 3493), was brought by Nebraska and alleges a number of violations by Wyoming of this Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) as amended in 1953, 345 U.S. 981 (1953) (hereinafter, collectively, the "Decree"). The relief sought is enforcement of the Decree in the particulars allegedly violated and injunctive relief. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief (hereinafter "Nebraska's Complaint"), at 3-4. Nebraska eschews any intent to seek a modification of the Decree. Nebraska's Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2.

The allegations of Wyoming's violations in the Nebraska Complaint are four in number. Two involve the North Platte itself and do not impact movant, Basin Electric Power Cooperative (hereinafter "Basin").

Two of the violations charged, however, directly and adversely impact Basin. Paragraph 3a of Nebraska's Complaint charges that Wyoming is violating Nebraska's decreed rights by:

> Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River.

Paragraph 3b charges that Wyoming is violating Nebraska's decreed rights by:

> Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers.

Basin seeks to intervene to ensure that any disposition on the merits of this case protects its existing water rights and ensures that Basin can continue to honor its obligations under an Agreement of Settlement and Compromise to which Basin and Nebraska, among others, are parties.

REASONS FOR GRANTING INTERVENTION

I. The Standards for Intervention in Original Actions Are Satisfied by Basin

The standards under which the Court considers intervention in original actions are reviewed at pages

3 and 4 of the Memorandum submitted by the Platte River Trust in support of its motion for leave to intervene and, in the interests of brevity, are not repeated here. As will be shown, Basin satisfies those standards.

A. Basin Has a Direct Interest in the Subject Matter of This Action Which is Compelling and Deserving of Protection

Basin is the Project Manager and Operating Agent of the Missouri Basin Power Project (hereinafter "MBPP") which commenced operation in 1980. MBPP is owned by a consortium made up of Basin and six other consumer or cooperatively owned electric utilities in the Missouri River Basin.[1] The MBPP Participants and their member distribution systems serve more than 1,200,000 people in eight of the Missouri River Basin states.[2]

The MBPP consists primarily of a 1500 megawatt electric generating station (the Laramie River Station) located near Wheatland, Wyoming, associated transmission facilities and Grayrocks Dam and Reservoir (hereinafter "Grayrocks"). The total capital cost of MBPP is approximately $1,340,000,000.

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[1] The Participants in the MBPP are:

Basin Electric Power Cooperative	42.27%
Tri-State Generation and Transmission Association of Thornton, Colorado	24.13%
Western Minnesota Municipal Power Agency, Ortonville, Minnesota	16.47%
City of Lincoln, Nebraska	12.76%
Heartland Consumers Power District	3.00%
Wyoming Municipal Power Agency, Lusk, Wyoming	1.37%

[2] The states are North Dakota, South Dakota, Montana, Wyoming, Colorado, Nebraska, Iowa and Minnesota.

Grayrocks is located on the Laramie River some 10 miles above the confluence of the Laramie with the North Platte River. See Appendix A-1.[3] With a storage capacity of about 104,000 acre-feet, Grayrocks Reservoir provides cooling water essential to the operation of the Laramie River Station.

Grayrocks will also supply a portion of the water for the Corn Creek irrigation development, planned by the Corn Creek Irrigation District, if and when that development materializes. Corn Creek proposes to divert water from the Laramie River at its confluence with the North Platte. It is the diversion occasioned by the potential Corn Creek project which, as explained in Wyoming's Brief in Opposition to Nebraska's Motion for Leave to File Petition, at pp. 7-8, is the alleged violation complained of by Nebraska in ¶ 3b of its Complaint.

While the Laramie River Station and Grayrocks were under construction, Nebraska joined with others, including the National Wildlife Federation and the National Audubon Society, in lawsuits (hereinafter the "Grayrocks litigation") challenging both the Rural Electrification Administration's issuance of loan guarantees for a substantial part of the MBPP's cost and the grant by the United States Army Corps of Engineers of a dredge and fill permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344. Named

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[3] Appendix A-1 is a map showing the location of Grayrocks, the Laramie River Station, the Big Bend reach of the Platte and most of the Bureau of Reclamation dams involved in the Nebraska Complaint. It also shows the location of Kingsley Dam of the Central Nebraska Public Power and Irrigation District and of its reservoir, Lake McConaughy, which has an original storage capacity of over 1,000,000 acre-feet.

as defendants were the Administrator of the Rural Electrification Administration and the Omaha District Engineer of the U.S. Army Corps of Engineers. Basin and some of the other MBPP Participants intervened as defendants.

Among other allegations, the complaints in the Grayrocks litigation charged that the depletion of the flow of the Laramie River resulting from the operation of Grayrocks and the Laramie River Station would, in turn, deplete and change the flow of the Platte River through what is known as the Big Bend reach of the Platte in Nebraska, stretching from Overton to Grand Island, a distance of some 53 miles. Overton itself is some 300 river miles downstream from Grayrocks. *See* Appendix A-1.

The changes in the regimen of the Big Bend reach attributed to the operation of Grayrocks would, it was further alleged, result in serious damage to the whooping crane, long designated as an endangered specie under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and for which the Big Bend reach had been designated "critical habitat" pursuant to that Act.

The cases were consolidated by the District Court and decided as *Nebraska v. Rural Electrification Administration*, 12 ERC 1156 (D. Neb. 1978). The District Court found violations of both the Endangered Species Act and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and enjoined further construction of Grayrocks Dam and the Laramie River Station until the requirements of those statutes were met.

On December 4, 1978, while the cases were pending on appeal in the Eighth Circuit, all parties entered

into an Agreement of Settlement and Compromise (hereinafter "Settlement Agreement").

So far as here material, by the Settlement Agreement:

1. Plaintiffs withdrew all objections to the actions theretofore taken by the federal defendants.

2. All parties agreed that compliance by MBPP with the Settlement Agreement satisfied the requirements of the Endangered Species Act.

3. The MBPP Agreed:

(a) to limit its consumptive use of Laramie River water for the Laramie River Station to a specified annual maximum;

(b) to make specified releases of water from Grayrocks;

(c) in the event the Corn Creek irrigation project were to come into operation, to deliver specified quantities of water into the mouth of the Laramie and certain specified quantities of water into the North Platte itself (these deliveries would constitute up to one-half of the Laramie depletion attributable to Corn Creek);

(d) through Basin, to establish, and provide initial capital ($7,500,000) for, the Platte River Whooping Crane Habitat Maintenance Trust (hereinafter the "Platte River Trust") under a trust declaration in the form included as an exhibit to the Settlement Agreement.

The effectiveness of the Settlement Agreement was conditioned on three conditions subsequent:

(a) Concurrence of the Secretary of the Interior in the parties' agreement that compliance by the MBPP

with the Settlement Agreement satisfied the requirements of the Endangered Species Act.

(b) An exemption for Grayrocks under the Endangered Species Act by the Endangered Species Act Committee as provided in section 5 of the Endangered Species Act Amendments of 1978, § 5, 92 Stat. 3751 (uncodified).

(c) Vacation of the Judgment of the District Court and dismissal of the lawsuits with prejudice.

Upon the effectuation of the first two conditions, the parties executed and filed with the Eighth Circuit a "Stipulation" so informing that Court. As requested in the Stipulation, the Eighth Circuit dismissed the appeals and remanded the cases to the District Court with instructions to dismiss the cases with prejudice, subject to the right of any party to the Settlement Agreement to petition the District Court for interpretation and enforcement of any of the terms of the Settlement Agreement itself.

The Settlement Agreement, the Stipulation and the District Court's Order of Dismissal are reproduced at Appendix A-20-36 of Wyoming's Brief in Opposition to Motion for Leave to File Petition. The concurrence of the Secretary of the Interior in the parties' agreement that compliance by MBPP with the Settlement Agreement would satisfy the requirements of the Endangered Species Act is reproduced in the Appendix hereto at p. A-2 and the formal decision of the Endangered Species Committee exempting Grayrocks is reproduced at p. A-4.

II. Basin's Interests May be Adversely Impacted by the Outcome of This Case

As noted earlier, Nebraska's Complaint charges that its rights to water under the Court's Decree are violated by the depletions of the North Platte's flows occasioned by operation of Grayrocks. Neb. Comp. ¶ 3a.

As also earlier noted, Nebraska further charges that its decreed rights would be violated by depletions at the confluence of the Laramie and the North Platte that would result if the potential Corn Creek irrigation development were to materialize. Neb. Comp. ¶ 3b. This charge also implicates Grayrocks because, under an agreement between Basin and the Corn Creek Irrigation District recognized by the Settlement Agreement, a portion of Corn Creek's water requirements will be provided from Grayrocks storage. If Nebraska prevails on this claim and Corn Creek becomes a reality, the draft on Grayrocks storage occasioned by Corn Creek could conceivably substantially increase, thereby impairing the electrical output of the Laramie River Station through a reduction in the availability to it of cooling water from Grayrocks.

Pending before this Court is the Motion of the Platte River Trust for leave to intervene. The Trust, it will be recalled, exists by reason of the Settlement Agreement, having been established and funded by Basin pursuant thereto. Nevertheless, the Trust endorses Nebraska's claims of Wyoming's violations of the Decree. Memorandum in Support of [Platte River Trust's] Motion to Intervene as Plaintiff, 15 n.7. One of Nebraska's charged violations is, of course, the North Platte River depletions occasioned by Grayrocks itself. Neb. Comp. ¶ 3a. Since Grayrocks went

into operation, no one, including Nebraska, has heretofore charged that Basin's depletions violate the Settlement Agreement.

Further, the relief sought by the Trust includes a modification of the Decree in order to require Wyoming to make Nebraska's North Platte water allocation available in accordance with a schedule to meet migratory bird needs in the Big Bend reach of the Platte. Platte River Trust's Complaint in Intervention ¶¶ 1, 3, Prayer ¶ 2. To the extent that such a schedule were to require changes in the timing or magnitude of Grayrocks' releases, it would be inconsistent with the Settlement Agreement, thereby also obviously adversely impacting Basin. In the event this Court allows the Trust's intervention, and Basin is also permitted to intervene, Basin will seek to amend appropriately its answer in this proceeding.

III. Basin's Interests Will Not Be Adequately Represented by Any Other Party

Basin obtained water rights for Grayrocks and the Laramie River Station pursuant to Wyoming law. Basin shares Wyoming's view that Nebraska is bound by the Settlement Agreement to which it is a party and that Grayrocks' operation does not violate any rights of Nebraska under the North Platte Decree.

Nevertheless, Wyoming itself was not a party to the Settlement Agreement, claims not to be bound by its provisions and, in important respects, has put Basin on notice that it questions the validity of some of them. In a letter of December 28, 1978 to Basin's Counsel, Wyoming's then Attorney General questioned, *inter alia*, the authority of Basin under Wyoming law, to make the releases contemplated by

paragraphs 4 and 5 of the Settlement Agreement. *See* Appendix at p. A-8. Similar admonitions have been repeated by responsible water administrators of the State of Wyoming, as is shown by the letter of April 2, 1986 from the Superintendent of Wyoming's Water Division No. 1 to the Plant Manager of the Laramie River Station. This letter, reproduced as Appendix at p. A-10, is representative of similar letters in past years.

In these circumstances, given Wyoming's expressed position, Basin clearly meets the burden of demonstrating a compelling interest in its own right justifying intervention even though Wyoming, which would otherwise be a parens patriae state, is a party. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953).

Nor can Basin's interests be adequately represented by the United States. Both in December of last year, when the federal government filed its original Memorandum in this action, and again in March when the federal government's answer was filed, federal government counsel was apparently unaware of the Grayrocks litigation, the Settlement Agreement and the federal government's connection therewith. The fact that the federal government was a party to the Grayrocks litigation and Settlement Agreement has now been brought to counsels' attention. Presumably, the federal government will, by appropriate amendment of its pleadings and in its presentation to the Special Master if one should be appointed, undertake to protect the rights and obligations of the federal government in the operation of Grayrocks as in the Settlement Agreement provided. Nevertheless, even in that event, while the federal government's interest would, to a degree, parallel some of Basin's interests,

Basin's interests would not be adequately represented by the United States.

Basin's interests (and those of the other Participants in the MBPP) include protection in this litigation of their considerable financial stake in maintaining the generating capability of the Laramie River Station within the constraints of the operation of Grayrocks permitted under the Settlement Agreement, as well as the interests of more than a million users of electricity in eight states that rely on MBPP for the continued availability of electricity therefrom. These interests are separate and apart from the federal government's own concerns in this litigation. The federal government's interests are the maintenance of adequate security for the loans guaranteed by the Rural Electrification Administration (which, however, constitutes only a portion of MBPP's financing[4]), the protection of the Bureau of Reclamation's interests in the North Platte and other federal reclamation projects involved, and the protection of the actions taken or approved by the federal government under the Endangered Species Act, including the premise upon which the exemption of MBPP from the Endangered Species Act was based.

IV. Basin's Participation Can Facilitate the Court's Disposition of this Action

There is an additional important consideration which warrants the according of intervenor status to Basin.

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[4] Only two of the Participants, Basin and Tri-State, received REA loan guarantees. The other Participants financed their shares of MBPP's construction cost with bond issues which were not guaranteed by REA or any other federal (or state) agency.

In addition to the valuable rights it seeks to protect in this litigation, Basin is in a unique position to make available information to the Court which will be critical to a resolution of this Case. Wyoming's third affirmative defense and Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File a Petition recognizes that the Settlement Agreement is an issue relative to the determination of the rights to flows from the Laramie River. Since Wyoming was not a party to the Settlement Agreement and Nebraska was a plaintiff in the Grayrocks litigation which resulted in the Settlement Agreement (as was the Intervenor-Applicant National Audubon Society), Basin is in the unique position of being able to provide valuable information to the Court in the interpretation of that document and its relevancy to this case. The application of the Settlement Agreement clearly will be one of the issues in the resolution of the dispute between Nebraska and Wyoming over the waters of the Laramie River.

In *Maryland v. Louisiana*, 451 U.S. 725, 745-46, n.21 (1981), this Court approved intervention by a number of parties because they had "a direct stake in [the] controversy" that would facilitate "a full exposition of the issues," adding that "it is not unusual to permit intervention of private parties in original actions."

CONCLUSION

For the foregoing reasons, Basin's motion should be granted.

Respectfully submitted this 13th day of April, 1987.

Of Counsel:

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(701) 223-0441

Counsel for Basin Electric Power Cooperative

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

ANSWER OF INTERVENOR BASIN ELECTRIC POWER COOPERATIVE TO PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

Answer

Intervenor Basin Electric Power Cooperative ("Basin") in answer to the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief, states as follows:

1. The allegations in paragraph 1 are admitted.

2. While Basin's intervention does not relate to the matters alleged in paragraph 2, the allegation that the North Platte Decree establishes restraints on storage of water in the Pathfinder and Guernsey Reservoirs is admitted. Basin is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation in paragraph 2.

3. The allegation in the introductory clause of paragraph 3 as it relates to subparagraph a and b is denied. The allegation that the operation of Grayrocks Reservoir depletes the flows of the North Platte River is admitted, but Basin denies that such depletions violate the North Platte Decree or Nebraska's equitable apportionment thereunder. Basin, on information and belief, understands that the depletions alleged in subparagraph b of paragraph 3 are those that would be made by an irrigation development that has been proposed by the Corn Creek Irrigation District. If and when constructed, a portion of the water required by the Corn Creek development would be supplied from water stored in Grayrocks Reservoir and released into the Laramie River for delivery to the Corn Creek development pursuant to the terms of a contract between Basin and the Corn Creek Irrigation District. Basin denies that such storage, release and delivery of water from Grayrocks Reservoir, if and when undertaken, would violate the North Platte Decree or Nebraska's equitable apportionment thereunder. Basin denies that any water has been, or is about to be, stored in or released from Grayrocks Reservoir for the Corn Creek development and denies further, on information and belief, that the Corn Creek development is a present reality or that it is under construction. Basin is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation in paragraph 3, none of which is relevant to Basin's intervention.

4. The allegations in paragraph 4 are denied. Except as such allegations relate to subparagraphs a and b of paragraph 3, they are not relevant to Basin's intervention.

5. Basin is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5.

6. Insofar as they relate to subparagraphs a and b of paragraph 3, the allegations of paragraph 6 are denied. Insofar as they relate to each and every other allegation in paragraph 3, Basin is without knowledge or information sufficient to form a belief as to the truth thereof.

7. The allegations of paragraph 7, being conclusions of law, do not require a response.

8. The allegations of paragraph 8 are admitted. Their relevance to subparagraphs a and b of paragraph 3 is denied.

Affirmative Defenses

1. Nebraska's Petition does not allege facts upon which relief can be granted.

2. Nebraska consented to the construction and operation of Grayrocks Reservoir in an Agreement of Settlement and Compromise dated December 4, 1978. Parties to that agreement included, *inter alia*, Basin, the State of Nebraska, the Rural Electrification Administration of the United States Department of Agriculture and the Corps of Engineers of the United States Department of the Army. The agreement further provided for the very operation of Grayrocks Reservoir and releases therefrom of which Nebraska's Petition complains, including, *inter alia*, the storage for and delivery of water to the Corn Creek Irrigation District. Nebraska is accordingly estopped from asserting that the construction or operation of Gray-

rocks Dam and Reservoir violates the North Platte Decree or its equitable apportionment thereunder.

3. The allegations of paragraph 3b do not constitute a case or controversy within this Court's jurisdiction under Article III, Section 2 of the Constitution of the United States.

4. Nebraska has no right to the waters of the Laramie River because (a) these waters were fully and equitably apportioned under the Decree of this Court in *Wyoming v. Colorado*, 259 U.S. 419 *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957), and (b) such a claim is barred by *res judicata*, Nebraska having unsuccessfully asserted a right to such water in *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

WHEREFORE, Basin prays that the Court enter an order affirming Basin's rights to use water from the Laramie River and its right to continue operation of Grayrocks Dam and Reservoir in accordance with the Agreement of Settlement and Compromise, and for such other and further relief as the Court deems just and proper in the circumstances.

Respectfully submitted this 13th day of April 1987.

EDWARD WEINBERG
(Counsel of Record)
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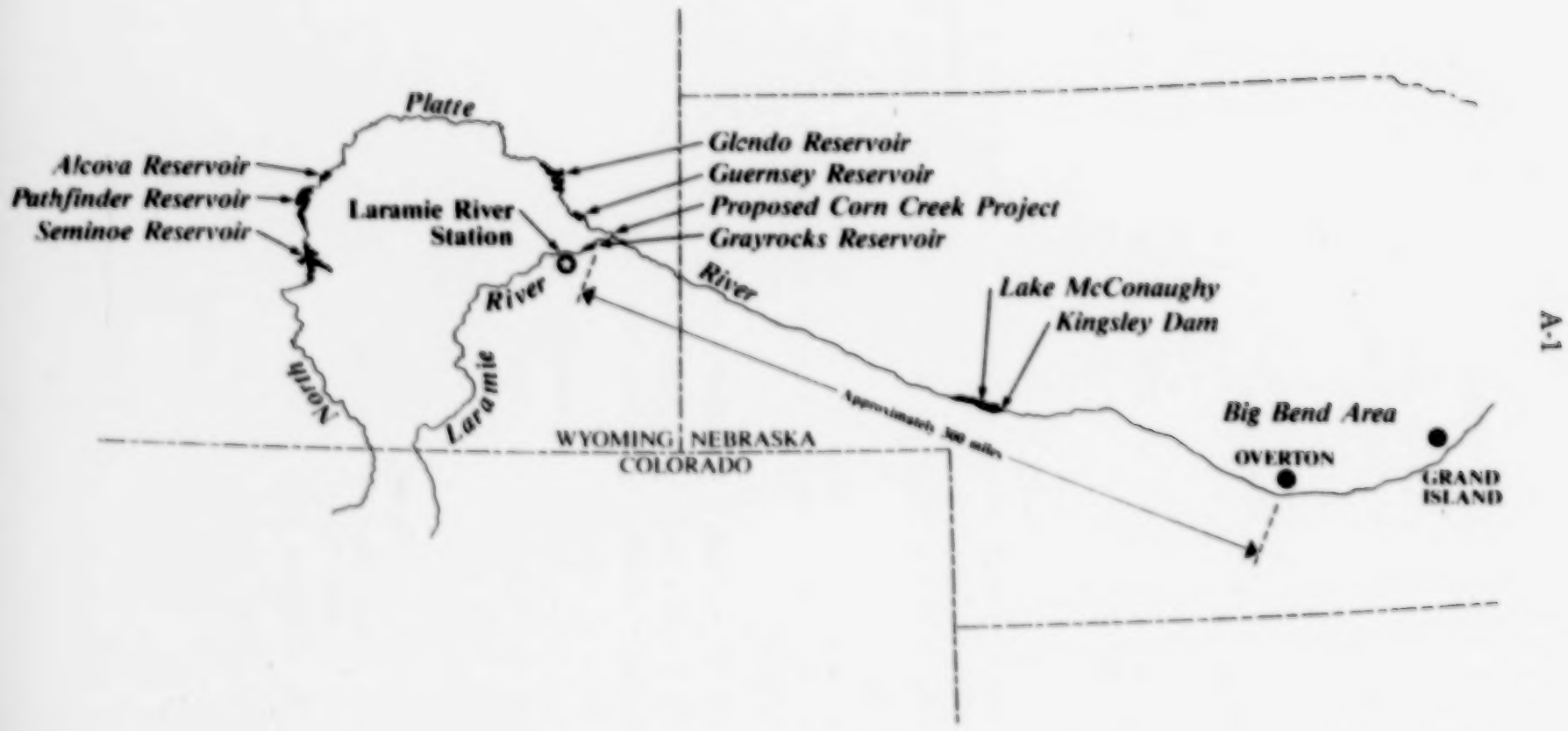
APPENDIX


Platte
Alcova Reservoir
Pathfinder Reservoir
Seminoe Reservoir
Laramie River Station
Glendo Reservoir
Guernsey Reservoir
Proposed Corn Creek Project
Grayrocks Reservoir
North Platte River
Laramie River
Lake McConaughy
Kingsley Dam
Approximately 300 miles
Big Bend Area
OVERTON
GRAND ISLAND
WYOMING
NEBRASKA
COLORADO

A-1

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 05 1978

Edward Weinberg, Esquire
Duncan, Brown, Weinberg
& Palmer, P.C.
Suite 1200
1775 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Dear Mr. Weinberg:

I have received an executed copy of the agreement submitted by you on behalf of all parties for the settlement of the litigation involving the Missouri Basin Power Project.

The agreement (section 14(a)) requires, as a condition to its effectiveness, that I concur with section 12 of the agreement.

I hereby express the requisite concurrence.

I am pleased that the parties to the litigation have found a suitable means to resolve their conflict.

Sincerely,

/s/ JAMES A. JOSEPH
Acting Secretary

cc: Patrick A. Parenteau, Esquire
National Wildlife Federation
1412 16th Street, N.W.
Washington, D.C. 20009

Mr. Paul Snyder
Office of the Attorney General

Department of Justice
2115 State Capitol
Lincoln, Nebraska 68508

Mr. David Palmerlee
P.O. Box 6288
Sheridan, Wyoming 82801

Mr. William E. Holland
Kutak, Rock, and Huie
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102

ENDANGERED SPECIES COMMITTEE:

APPLICATION FOR EXEMPTION FOR

GRAYROCKS DAM AND RESERVOIR

DECISION: Exemption granted, with specified mitigation and enhancement measures.

PROPOSED AGENCY ACTION:

The project at issue is the Grayrocks Dam and Reservoir, which is part of the Missouri Basin Power Project. It is subject to the Endangered Species Act limitations on federal actions because the federal Rural Electrification Administration (R.E.A.) is guaranteeing a portion of the construction costs and because it requires an Army Corps of Engineers permit for discharge of dredged or fill material into navigable waters pursuant to Section 404 of the Federal Water Pollution Control Act.

The Missouri Basin Power Project also includes the Laramie River Power Station and associated transmission facilities. The Laramie River Power Station will produce 1500 megawatts of electricity from three coal-fired steam electric generating plants. The Grayrocks Dam and Reservoir will be the principal source of cooling water to the plants.

As a result of the Grayrocks Dam and Reservoir (and other existing and proposed projects), the streamflow of the Platte River could be reduced sufficiently to modify adversely or to destroy the critical habitat of the whooping crane (nearly 300 miles downstream).

Independent of the Endangered Species Act section 7 consultation process, parties to litigation involving the dam and reservoir (*Nebraska v. R.E.A.* and *Nebraska v. Ray*, cases No. CV 78-L-90 and No. CV 78-L-242, U.S. Dist. Ct. for the Dist. of Neb. and cases No. 78-1775 and No. 78-1778, 8th Cir. Ct. of Appeals) reached an agreement

for settlement and compromise, signed December 4, 1978. Under the settlement and compromise, the Missouri Basin Power Project agrees to:

1) Limit its maximum annual water use to 23,250 acre-feet per year. (Section 1)
2) Make certain releases of water during various periods of the year. (Section 4)
3) Replace up to 11,250 acre-feet (subject to adjustments) withdrawn by Corn Creek Irrigation District. (Sections 5, 6, and 7)
4) Establish a trust fund of $7.5 million for the maintenance and enhancement of the whooping cranes' critical habitat along the Platte River. (Section 10 and Exhibit B)
5) Otherwise restrict operations of the project. (Sections 2, 3, 8, 9, and 11)

BASIS FOR DECISION:

Acting pursuant to the Endangered Species Act Amendments of 1978, the Endangered Species Committee proceeded to consider an exemption for the Grayrocks Dam and Reservoir on December 8, 1978, and on January 23, 1979, decided to grant the exemption.

The decision to grant the exemption was based on a unanimous vote of the eight Committee members (with the members representing the states of Wyoming and Nebraska each casting one-half vote) voting in person at a public meeting in the auditorium of the Department of the Interior in Washington, D.C., on January 23, 1979.

The decision was made on a record composed of testimony taken at hearings in Cheyenne, Wyoming and Washington, D.C. on January 8, 1979, and on other evidence submitted to the Committee and placed in the record on or before

January 10, 1979. It is based on a determination by the Committee that:

(i) There are no reasonable and prudent alternatives to the agency action, and

(ii) The benefits of the proposed agency action clearly outweigh the benefits of alternative courses of action which are consistent with conserving the whooping crane or its critical habitat, and

(iii) The proposed action is in the public interest.

That determination is based on findings made on the record and summarized below:

I. *Alternatives.* Alternatives to the agency action which were submitted to the Committee for consideration were: (1) Replacement of the water consumed through purchase from other sources; (2) Maintenance of the crane's critical habitat by mechanical means; (3) Replacement of the wet cooling system to conserve water; and (4) Noncompletion of the dam. (See Chapter 2 of the Staff Report.)

II. *Analysis of Alternatives.* None of the alternatives are reasonable and prudent. (See Chapter 2 of the Staff Report.)

III. *Comparison Costs and Benefits.* Benefits of the proposed agency action include supplying cooling water to the Laramie River Power Station, irrigating some farmland, and providing some reservoir recreation. The benefits of the proposed agency action clearly outweigh the benefits of the alternatives which are consistent with conserving the whooping crane or its critical habitat. (See Chapters 1 and 2 of the Staff Report.)

IV. *Public Interest.* The proposed agency action is in the public interest. (See Chapter 3 of the Staff Report.)

The Committee also established that the requirements set out in Sections 1 to 9 and 11 and in Exhibit 8 of the

Agreement of Settlement and Compromise, referred to above, are reasonable mitigation and enhancement measures which are necessary and appropriate to minimize the adverse effects of the project on the whooping crane or its critical habitat.

ORDER

On the basis of the findings stated above, the Committee grants an exemption for the Grayrocks Dam and Reservoir from the requirements of the Endangered Species Act, provided that the mitigation and enhancement measures listed above are funded concurrently with other project features, paid for by the Missouri Basin Power Project and otherwise carried out in compliance with the Endangered Species Act Amendments of 1978. These mitigation and enhancement measures are to be carried out without regard to the final disposition of the Agreement of Settlement and Compromise signed by the litigating parties.

Signed on behalf of the Endangered Species Committee:

/s/ CECIL D. ANDRUS — 2-7-79
CECIL D. ANDRUS, Chairman — Date

THE STATE [Seal] OF WYOMING **ED HERSCHLER**
Governor
In reply refer to: JOHN J. ROONEY
ATTORNEY GENERAL

ATTORNEY GENERAL

CHEYENNE, WYOMING 82002

December 28, 1978

Mr. Ed Weinberg
Duncan, Brown, Weinberg & Palmer, P.C.
Suite 200
1775 Pennsylvania Avenue Northwest
Washington, D.C. 20006

Dear Mr. Weinberg:

I am leaving the office of Attorney General on January 1, 1979 to become a Justice of our Supreme Court.

I have been meaning to comment to you on the Grayrocks agreement, but wanted to wait until all federal actions re approval were cleared.

The State of Wyoming may not cooperate with the priorities set forth in paragraph No. 2, since their issued permits already set forth priorities whereby the well water will be the last to be utilized. Of course, we reserve the right to establish measurement stations on our waterways—actually I think the ones referred to in the agreement are already established. Finally, we have authorized the various appropriations to Missouri Basin for the industrial use of the project. Any effort to change this to downstream use by others will not be authorized.

Wanted you to have these few thoughts before I left office.

Very truly yours,

/s/ JOHN J. ROONEY
Attorney General

JJR:rb

THE STATE [seal] OF WYOMING ED HERSCHLER
Governor

BOARD OF CONTROL

511 West 27th Street April 2, 1986 Torrington, WY 82240

Mr. Dallas Wade
Plant Manger
Laramie River Station
Box 1346
Wheatland, WY 82201-1346

Dear Mr. Wade:

This letter will acknowledge receipt of requests for regulation of the Laramie River to supply the various permits owned by Basin Electric.

This letter will serve to reaffirm the State's previous position that we cannot justify denying water to any Wyoming Water User in order to honor Basin Electric's permits so long as water (which has been available to fill these rights) is being released from Grayrocks Reservoir to meet out of state commitments, which are not recognized by Wyoming.

Runoff forecasts would indicate that hopefully there will be on adequate supply of water for these rights without regulation.

Sincerely,

/s/ EARL MICHAEL
EARL MICHAEL, Supt.
Water Division No. 1

EM/dh
cc: James Pugh
Dave Buyok
George Christopulos, c/o H. Taylor